

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 06M-14

In the Matter of)	EB Docket No. 04-381
)	
Florida Cable Telecommunications)	
Association, Inc.; Comcast Cablevision of)	
Panama City, Inc.; Mediacom Southeast,)	05453
L.L.C.; and Cox Communications Gulf,)	
L.L.C.,)	
)	
Complainants,)	
)	
v.)	
)	
Gulf Power Company,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Issued: May 25, 2006

Released: May 26, 2006

Background

1. On February 18, 2005, the Presiding Judge signed a “*Stipulation and Agreed Confidentiality Order*” (“*Confidentiality Order*”) that was submitted by parties, Florida Cable Telecommunications Association, Inc. *et. al.* (Complainants) and Gulf Power Company (“Gulf Power”). It applies to the discovery phase of this case, and it states no restrictions with respect to the “confidentiality” of documents received in evidence at hearing.’

2. A hearing was conducted on-the-record from April 24 to May 1, 2006. In open court, numerous documents, primarily originating with Gulf Power, were identified and marked by the parties, and without assertion of “confidentiality,” were received in evidence. Documentary evidence that was offered in evidence but rejected by the Presiding Judge remained in the record as rejected exhibits. No redacted versions of documents or deposition transcripts were submitted to replace unredacted versions that were received in evidence. There were no objections made by Complainants, Gulf Power,

¹ The *Confidentiality Order* remains in effect until sixty days after final resolution of this hearing, including appeals. The parties may at any time agree to procedures and time schedules for disposing of or returning “confidential” documents exchanged in discovery that were not introduced as evidence at the hearing.

or the Enforcement Bureau to unredacted usage of such evidence in post-hearing fact-finding. Nor was there a request made at the hearing that any testimony should be treated as “confidential.”

3. The Presiding Judge is empowered to provide for procedures regulating full disclosure of evidence in a hearing. *See* 47 C.F.R. § 1.243(d), (f), (i), and (j) (presiding judge rules on questions of evidence; regulates course of hearing; disposes of procedural matters; and makes rulings under *APA*). Such discretionary power would apply to the Presiding Judge in rejecting any “confidential” assertion for hearing evidence that he will consider in an initial decision.

Discovery Order

4. The prehearing ***Confidentiality Order*** protects from public disclosure documents that were exchanged between the parties “**in the course of discovery.**” (Emphasis added.) The ***Confidentiality Order*** clearly contemplates exchanging documents in discovery that may be designated as “confidential.” But there is no provision in the ***Confidentiality Order*** for treating documents that had been stamped “confidential” and were offered in evidence at hearing.

5. “Confidential information” is broadly defined under the ***Confidentiality Order***:

“Confidential Information” means (i) information or materials required to be provided under the Commission’s rules and regulations and orders of the Presiding Officer in EB Docket No. 04-381; and (ii) information or materials submitted by a Submitting Party (as defined herein under Section (1)(f)) in EB Docket No. 04-381 and as claimed by Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., Bright House Networks, L.L.C. or by Gulf Power Company.

Procedures for claiming confidential treatment in discovery merely required flagging documents as “Confidential-BusinessProprietary Information – EB Docket No. 04-381.” Where feasible, parties were to submit “redacted version(s) not containing Confidential Information.” While some of the documents introduced in evidence had been flagged as “confidential,” no redacted versions were sought to be substituted for unredacted “confidential” documents that were marked and received in evidence. When considered in context, the ***Confidentiality Order*** was intended to facilitate broad documentary discovery. But it was not intended only to provide permanent “confidentiality” protection for the more narrow universe of documents selected by the parties for use as evidence at hearing.

6. Even in granting the parties' **Confidentiality Order** for use in discovery, the Presiding Judge reserved the right to "require evidence to be placed on the public record," citing *Bartholdi v. FCC*, 114 F. 3rd 274,280 – 82 (D.C. Cir. 1997), and *Chrysler Corp. v. Brown*. 441 U.S. 281,293 (1979). The relevant Commission rule concerning records not routinely available for public inspection [47 C.F.R. § 0.457(a)-(f)] delineates categories of documents for presumptive protection. Section 0.457(d) affords confidential protection for "trade secrets and commercial or financial information obtained from any person and privileged or confidential – categories of materials not routinely available for public inspection." In the **Confidentiality Order** governing discovery, the parties agreed to designating documents as "Confidential" to facilitate discovery. Solely to facilitate discovery, those documents were permitted to be treated as if they contain "(i) trade secrets and commercial, proprietary or financial information or (ii) critical energy infrastructure information that is privileged and confidential." But there was no definitive ruling on applicability of concepts of trade secret, commercial or financial matter justifying "Confidential" protection.

7. For the hearing phase, the **Confidentiality Order** contemplated a ruling by the Presiding Judge on whether documents stamped "Confidential are not entitled to such status and protection" and that "the proponent of confidentiality must show by a preponderance of the evidence that the materials fall within an exemption to disclosure contained in the Freedom of Information Act --- or other governmental exemption from disclosure, or are subject to existing nondisclosure obligations to a third party." In **Order FCC 04M-41 n.5**, released December 15,2004, the Presiding Judge noted that "[d]ocuments produced [in discovery] may be stamped "Confidential," but "that description may later not apply to evidence introduced on-the-record at the hearing." The parties acknowledged that note in the **Confidentiality Order**. The Presiding Judge has determined that it is in the public interest to revisit the question of confidentiality of documents that are now evidence in the hearing.

8. There is a recognized tension between the **Administrative Procedure Act** ("APA") requirement for fully explained adjudicative rulings based on documents which are part of the record, and FOIA's policy for permitting the protection of certain documents that qualify as "trade secrets and commercial or financial information." Full disclosure of documents that are germane to findings of fact and conclusions of law in an adjudicated **Initial Decision** accords with the APA requiring rulings to be grounded on the record. § U.S.C. §555(e) and §556(e).² Under relevant case authorities, such "tension" should be resolved in favor of disclosure. See *U.S. Department of Defense v. FLRA*, 510 U.S. 487,495 (1994) (Court finds public interest in disclosure in the significant contribution it makes to public understanding of the operations or activities of the

² The Commission has worked towards the amelioration of that tension. See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission* (GC Docket No. 56-55), FCC 96-109, released March 25, 1996, at Paras. 25 – 29 (the protective order approach); *modified*, 13 FCC Rcd 24,816 (1998); *recon. denied*, 14 FCC Rcd 20,128 (1999) (full confidentiality of tariff cost support data rarely granted).

agency). *See also FCC v. Schreiber*, 381 U.S. 279,291-92 (1965) (Commission empowered to authorize public disclosure of information or to receive data in confidence upon a balancing of public and private interests). In *Qwest Communications v. FCC*, 229 F. 3d 1172 (2000), the Commission ordered disclosure to business competitors of raw audit data on statistical sampling that qualified for protection under the Trade Secrets Act. The Commission policy is that “data pertaining to the evaluation of the property of common carriers” will “normally” be made “available for inspection.” 47 C.F.R. § 0.457(e)(2). So too in this case, decisional evidence pertaining to the hearing issue should remain in the public domain.

Discussion

9. Gulf Power has the burden of proof and is seeking to present a strong evidentiary case. But Gulf Power also has an interest in protecting its business documents. The documents considered for non-confidentiality are those documents designated by Gulf Power to be “Confidential” and that were marked as exhibits and offered by the parties and received in evidence at hearing. Relevant and decisionally significant portions of such documentary evidence, and the opinions of experts based on that evidence, will be considered in deciding, *inter alia*, ultimate issues of pole capacity and “fair market value” of pole space on Gulf Power’s utility poles allegedly taken by cable attachments of Complainants.

Gulf Power’s expert testified:

I have been asked to review documentary and testimonial evidence and provide my opinions on the appropriate method by which to estimate the fair market value of the pole space taken on Gulf Power’s poles. I have also been asked to review and comment upon the replacement cost methodology proposed by Gulf Power. My testimony is provided to assist the Administrative Law Judge and the Commission in determining the appropriate method for estimating the fair market value of the space taken on Gulf Power’s electric distribution poles by the Complainants.

(*Gulf Power Exh. F*, Direct Testimony of Roger A. Spain, C.P.A., C.V.A. at 4.)

Complainants’ expert also testified:

I was asked by counsel for the Florida Cable Telecommunications Association (“FCTA”) to review materials relating to Gulf Power Company’s (“Gulf Power” or “the utility”) claim for additional compensation for member attachment poles. As part of my assignment, I was asked to assess the validity of Gulf Power’s claims in accordance with established economic and public policy

principles, and in the context of the Eleventh Circuit's *Alabama Power Company* ("AlabamaPower" or "APCo") decision (*Complainants' Exh. A*, Direct Testimony of Patricia D. Kravtin at 3.

For no discernable reason, Complainants have marked the written testimony of Ms. Kravtin as "Confidential," while Gulf Power has not claimed "confidentiality" for the testimony of Mr. Spain. Yet both experts **are** testifying on the same subject and both have reviewed Gulf Power's documents.

10. In this adjudicated case, it is the parties, and not the Commission, who selected evidence that they voluntarily offered into evidence for consideration by the Commission in a public proceeding. *Compare Kannapolis TV Co.*, 80 FCC 2d 307, 308 (Commission will permit inspection of financial reports when party places its financial condition in issue). In this *APA* adjudicatory hearing, it is necessary to account for all issue relevant evidence that is presented to and considered by a decision maker. The *APA* mandates accounting for all probative, decisional evidence, and in adjudicated decisions of Administrative Law Judges:

All decisions, including initial, recommended and tentative decisions, **are** a part of the record and shall include a statement of --- findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record.

5 U.S.C. § 557(b)(3)(A). The Supreme Court held that public disclosure of evidence is "well within the Commission's statutory authority," while confidential treatment requires a demonstration that "the public interest, proper dispatch of business, **or** the ends of justice would be served by non-public disclosure." *FCC v. Schreiber*, *supra* at 1984. *See also Communications Act*, 47 USC § 154(j) (Commission has discretion to conduct proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

The "Confidential" Evidence

11. In an initial review of the documentary evidence, there **are** found to be approximately 53 out of 74 documents sponsored by Gulf Power designated as "Confidential," while Complainants designated as "Confidential" approximately 23 documents out of 84. Deposition testimony introduced in evidence was offered and received both with and without "Confidential" designations.³ Gulf Power designated as

³ *See, e.g.*, Gulf Power Exh. 66, Deposition of Bruce Burgess; Gulf Power Exh. 67, Deposition of Mark O'Callaigh; Gulf Power Exh. 68, Deposition of Shayne Routh; Gulf Power Exh. 69, Deposition of Jeff Smith; Complainants Exh. 39; Identification of Utility Poles; Complainants Exh. 55, Complainants' Response to Interrogatories; Complainants Exh. 56, Gulf Power's Responses to Interrogatories.

“Confidential” materials such as existing pole attachment agreements; statement of work and reports of Osmose consultant; estimated replacement calculations and replacement costs for pole attachments; and billing analysis of Complainants payments. While these documents are business-related, there is no showing that they **are** trade secret or commercial or financial documents which would cause harm to Gulf Power if made public.

12. Also, Gulf Power has been inconsistent in its claims of “confidentiality”. For example, Gulf Power Exh. No. 1 consists of 851 pages in a single large binder, none of which are marked “Confidential.” The numerous documents were publicly filed in support of a case dispositive Motion and Affidavit submitted by Gulf Power before being designated for hearing, laying out the theory and underlying business facts of Gulf Power’s case-in-chief. In the Affidavit of Michael R. Dunn, Gulf Power’s Project Services Manager, **Mr.** Dunn provided the Commission with a sworn explanation of reasons given for canceling Complainants’ cable attachment agreements which are subject to the Commission’s formula rate. The documentation attached to the **Dunn** Affidavit includes documents of the kind that Gulf Power has stamped “Confidential”. Neither **the** Affidavit nor the Motion nor the supporting documents were designated as “Confidential.” This extensive open disclosure of documents does not appear to be consistent with Gulf Power’s assertions of “confidentiality” of similar documents that it sponsored and introduced in its case-in-chief on the merits?

Conclusion

13. It is determined to be in the interest of this case to fully disclose the evidentiary record presented by the parties and relied on by the Presiding Judge. The initial decision must be based on the evidence sponsored and cited by the parties in proposed findings and conclusions, and in reply findings and conclusions. There has been no showing of a need to subject such evidence in the hearing record to limitations of the discovery generated *Confidentiality Order*? Therefore, Gulf Power, if it decides to **be** a

⁴ A sampling of documents accompanying the Dunn Affidavit include attachment agreement between Gulf Power and Comcast; attachment agreement between Gulf Power and Mediacom Southeast; attachment agreement between Gulf Power and Cox Communications; attachment agreement between Gulf Power and TWC d/b/a Emerald Coast; business letter from Gulf Power to Mediacom Southeast; Gulf Power’s proposed mandatory access **pole** attachment agreement; new pole attachment agreement between Gulf Power and Mediacom Southeast; new pole agreement between Gulf Power and Cox Communications; Gulf Power billing to Cox Communications based on the higher **\$38.06** replacement price (per pole).

⁵ It would be extremely burdensome on the parties, and also extremely time consuming, to require redacted versions of Proposed Findings of Fact and Conclusions of Law and **Reply** Proposed Findings and Conclusions, in addition to non-redacted sealed versions. “Confidentiality” treatment of the record also would inhibit a free flow of ideas in the scheduled oral argument that was requested by the parties, now scheduled for June 29, 2006. It may be the better alternative to cancel any oral argument if questions of “Confidentiality” will come up in the lively give and take of questions and answers.

proponent of permanent “Confidentiality” for documents received in evidence, must provide definitive answers on the following points in a showing of cause:

- (1) Identification of the specific information for which confidential treatment is sought;
- (2) Description of the circumstances giving rise to the submission;
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret;
- (4) Explanation of the degree to which the information concerns a service that is subject to competition;
- (5) Explanation of how disclosure of the information could result in substantial competitive harm;
- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;
- (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and
- (9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

See 47 C.F.R. § 0.459(b). Gulf Power must also be prepared to redact only discrete portions of documents that meet the standards for “Confidentiality.”⁶

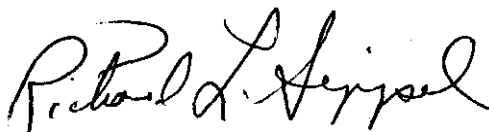
⁶ If the Presiding Judge is persuaded of a right to assert “Confidentiality,” it will become the burden of Gulf Power to prepare redacted documents that coincide with marked exhibits, and to substitute redacted copies for the non-redacted versions that are intended for the public record. There also will need to be non-redacted documents submitted to the Secretary’s Office under seal in properly marked envelopes. Finally, it may be necessary to redact portions of public versions of the respective Proposed Findings and Proposed Reply Findings.

Order

IT IS ORDERED that Gulf Power Company, or any party to this proceeding, **MAY SHOW CAUSE** by **June 5,2006**, why any portion of the documents or deposition transcripts marked for receipt in evidence or received in evidence at the hearing should be treated as "Confidential" in the hearing record of this proceeding.

IT IS FURTHER ORDERED that any Opposition of any party, or any Comment by the Enforcement Bureau may be filed by **June 12,2006**, and a concise Reply may be filed by **June 16,2006**.

FEDERAL COMMUNICATIONS COMMISSION⁷

A handwritten signature in black ink, appearing to read "Richard L. Sippel", written in a cursive style.

Richard L. Sippel
Chief Administrative **Law** Judge

⁷ Courtesy copies of this **Order** were transmitted to counsel for each of the parties by e-mail on the date of issuance.